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Antinaturalism in the legal philosophy of Joseph Raz

Antynaturalizm w filozofii prawa Josepha Raza

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Abstract:

The aim of this article is to critically analyse the methodological standpoint of Joseph Raz in his research on law. The basic assumptions of Raz's antinaturalism are presented in the first part of this work. Particular attention is paid to the concept of reason, as it is a crucial feature of his explanation of law. The second part of the paper contains the analysis of the assumptions of his view pertaining to the nature of the mind. According to the most important of those assumptions, rules causally influence thought and action. In the third part of the paper, it is argued that this claim should be regarded merely as a useful idealisation.

Keywords:

Joseph Raz, legal antinaturalism, normativity, reasons, internal point of view on law

Streszczenie:

Celem artykułu jest krytyczna analiza stanowiska metodologicznego przyjmowanego przez Josepha Raza w jego badaniach nad prawem. W pierwszej części artykułu szkieletowo przedstawione zostały podstawowe założenia antynaturalizmu Raza. Szczególna uwaga poświęcona została pojęciu racji, ponieważ to właśnie ono znajduje się w centrum koncepcji wyjaśnienia prawa tego filozofa. W drugiej części artykułu zwrócono uwagę na te konsekwencje jego poglądów, które dotyczą natury umysłu. Najważniejsze z nich to założenie o faktycznym wpływie reguł na myślenie oraz działanie. W części trzeciej owo założenie poddane zostało krytycznej analizie, zgodnie z którą traktować je należy jedynie jako użyteczną idealizację.

Słowa kluczowe:

Joseph Raz, antynaturalizm prawniczy, normatywizm, racje, wewnętrzny punkt widzenia na prawo

1. Introduction

I will hereafter understand antinaturalism in the philosophy of law as a methodological standpoint, according to which the satisfactory explanation of law is evaluative. In my analysis, I will focus on antinaturalism of Joseph Raz. Raz's standpoint in this matter seems to be representative for quite a large group of philosophers – not only philosophers of law. As it will turn out, this type of antinaturalism can be applied to social sciences in general^[1]. In a nutshell, Raz claims that in order to explain the law, it is necessary to specify how the legal rules – understood as reasons – influence action. According to him, explanation of this phenomenon inevitably leads to evaluative analyses, i.e. analyses whether a given action is right or justified. So, on the one hand, legal rules are understood here as causally influencing the action – as action's motives. On the other hand, explanation based on legal rules is different from causal explanation, as the latter does not necessarily involve evaluation.

Despite the intuitive attractiveness of Raz's views, his version of antinaturalism – as it will be argued – loses credibility when it is assessed in the context of contemporary empirical sciences of the mind. The key assumption of Raz's conception (as well as the conceptions of many other methodological antinaturalists who share his views) pertains to the nature of the human mind; it states that the human mind is able to identify

the rules relevant to thought and action, and respond to them in an appropriate manner. If we adopt this assumption, we should agree with its following consequence: explanation of the human mind requires referring to these rules. However, determining the rules of thought or action eludes scientific explanation of the mind, as the goal of this explanation is to establish the facts concerning the mind, not the rules which should underpin its functioning. As it is sometimes mentioned, empirical sciences explore the reality as it is, and not as it should be. However, there are reasons to reject this view which can be described as normativism about the mental.

Basic assumptions of Raz's methodological antinaturalism will be presented in the first part of the article. Particular attention will be paid to the concept of reason, as it is a crucial feature of his views on the explanation of law. The second part of the paper contains the analysis of these assumptions of his views which pertain to the nature of the mind. The most important assumption will be the already mentioned understanding of the influence of rules on thought and action. This assumption will be critically analysed in more detail in the third part of the paper. In the last part of the paper I will argue that – despite various doubts concerning the assumption mentioned – it is essential to understand what the law is, as it provides conceptual tools necessary to explain the legal rules' influence on behaviour.

2. Joseph Raz's normativism

Raz claims that whenever we explain purposeful or intentional behaviour, it is necessary to refer to its reason^[2]. This is a rather noncon-

¹Philosophers whose views are similar to Raz's in this context are, for example, Ch. Korsgaard (The Normative Constitution of Agency (2014), in: *Rational and Social Agency: The Philosophy of Michael Bratman*, eds. Vargas, M., Yaffe, G., Oxford: Oxford University Press, p. 190–214), R. Wedgwood (The Nature of Normativity, Clarendon Press, (2007) Oxford), J. Broome (Reasons (2004), in: *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, Oxford: Oxford University Press, p. 28–55), or Millar, A., (Understanding People. Normativity and Rationalizing Explanation, (2004) Oxford: Oxford University Press).

²Raz, J. (2009) Reason: Explanatory and Normative, in: New

troversial claim – not only in the philosophical context, also in ... in the sciences of the mind and behavior^[3]. Thus, there is an important difference in the explanation of intentional and unintentional behaviour. In the first case, describing the reasoning of a given person is crucial for the explanation; the reasoning which led to taking a certain action, that is what the person took into consideration, what he or she claimed to be justified or reasonable, what he or she considered as reason for the action. Hence, almost by definition, we are always aware of the reasons for our actions. Using a metaphor proposed by Herbert L. A. Hart, popular in the philosophy of law, explanation based on reasons is the explanation from the internal point of view, that is from the point of view of the person whose action is being explained^[4]. On the other hand, to explain unintentional behaviour, an ‘ordinary’ type of cause – such as personality trait, unconscious or biological factors influencing this behaviour – is sufficient. This type of is made from the external, scientific point of view. Identifying the causes of behaviour which the target person may be unaware of is one of the interesting aspects of the explanation from the external point of view. Raz claims that explanation of the law should be conducted from the internal point of view – that is from the point of view of people who practice law, recognize legal rules as reasons of actions and follow them in their actions^[5].

Underscoring the function of reasons in explaining the action does not yet make Raz’s stance antinaturalistic. Despite the difficulties in determining what reasons are (e.g. difficulties pertaining to the explanation of how consciousness affects one’s behaviour), reasons may be understood causally – i.e. as mental states that influence thought and action. Beliefs or intentions may be such mental states. For example, if we want to explain why a given person behaved lawfully, we may refer to his or her belief that a given legal rule is valid. What is more, this belief may be understood as a physical state of this person; we might assume that it was a state of his or her brain. Therefore, this understanding of reasons seems to be reconcilable with the contemporary sciences of the mind. Indeed, reasons understood as mental states are an essential part of the scientific explanation of the mind^[6].

Raz does not, however, agree that all reasons – that we refer to in the explanation from the internal point of view – are beliefs; embracing his terminology, not all reasons are ‘explanatory reasons’. In his opinion, they have this explanatory function only because there is something even more basic than themselves – i.e. ‘normative reasons’. Raz’s antinaturalism is grounded in the distinction between explanatory reasons and normative ones, as well as his understanding of the latter. Namely, normative reasons have a very special, dual role. They are used both in explaining the action, but also, and primarily, in its assessment – that is determining whether it was right, reasonable or justified. Moreover, in Raz’s opinion, it is the

London, p. 171.

Essays on the Explanation of Action, ed. Sandis, C. Palgrave MacMillan, Basingstoke, p. 184.

³Malle, B. (2004) *How the Mind Explains Behaviour*. Folk Explanations, Meaning and Social Interaction, MIT Press, Cambridge, MA, p. 6–27.

⁴Hart, H. L. A. (2012) *The Concept of Law*, ed. 3, Oxford: Oxford University Press, p. 89–91.

⁵Raz, J. (1975) *Practical Reason and Norms*, Hutchinson,

⁶Crane, T. (2016) *The Mechanical Mind. A Philosophical Introduction to Minds, Machines and Mental Representation*, ed. 3, Routledge, New York, p. 4.

second, evaluative role of normative reasons that enables them to be explanatory^[7]. In other words, the explanatory function of the normative reasons is secondary.

Normative reasons are not beliefs but something that grounds beliefs. Therefore, these reasons are more basic than beliefs. According to Raz, 'normative reason is a fact that – if someone acts on its basis – gives a purpose or a cause to this action, and this action is taken because of this cause or in pursuit of this target'^[8]. As an example, according to the Polish Code of civil procedure, if one does not understand the sentencing part of the judgement in a case in which he participates as a party, they can file a motion for the justification of the judgement within seven days upon receiving the sentencing part. In this case, this legal regulation is a fact constituting the reason for action of a party. On the other hand, the party's belief that he or she has this right is not such a fact; the fact in question, or the reason for action, exists regardless of whether he or she is aware of its existence.

As normative reasons are facts, let us call these reasons for action 'normative facts'. Taking into consideration that normative reasons are facts – i.e. they are objective – they are, in a way, good reasons by definition. This makes normative reasons as being able not only to explain the action, but also to assess it. Raz claims that:

One may say that reasons for a belief are those facts which explain the believing, meaning the acquisition of the belief when it was rationally

induced. But this view allows that 'reasons' is ambiguous between explanatory reasons, which, presumably, can explain all beliefs, and normative reasons for belief, which also explain those beliefs which were rationally arrived at, that is beliefs arrived at because of reasons for the beliefs (and the same can be said of the explanation of why one rationally sustains certain beliefs when the explanation invokes reasons for those beliefs). Regarding the latter kind of reasons their ability to explain the believing depends on the fact that they are normative reasons, reasons which can justify a belief, whether or not they also explain it, and which explain beliefs as rational or justified because they are normative reasons^[9].

In other words, the normative reasons are objective criteria of evaluating the action. If the reasons were only explanatory, they could then also be bad reasons, as the actions are sometimes undertaken without due consideration. The normative facts are the foundation for explanation and assessment of the beliefs, yet they cannot be explained by beliefs. Consequently, the normative facts cannot be understood as something grounded in beliefs on what is right, rational or justified. In order to explain the behaviour using normative reasons, in the first place it is necessary to determine what these reasons are in the context of a given action, that is what are the normative facts related to it.

Using the above scheme of Raz's conception, we may already notice why his stance on explaining law should be considered methodological antinaturalism. It is not the goal of the scientific explanation to determine what is right, rational or justified – at least on its conventional

^[7]Raz, J. Reason: Explanatory and Normative, p. 188.

^[8]Ibidem, p. 184.

^[9]Ibidem, p. 189.

understanding. Still, it difficult to understand why Raz claims that normative facts are essential for explaining the action and why they are primary, that is irreducible to the level of beliefs on these facts. A weaker interpretation of these facts is *prima facie* possible – that is understanding them as something based on beliefs of the persons whom these facts concern.

Raz analyses an example that well illustrates our foregoing discussion. Let us focus on the below explanations of action

1. The subject did that, as he was convinced that R.
2. The subject did that, as he was wrongly convinced that R (where R is the reason for action)^[10].

Clearly, these explanations differ. The first explanation is based only on the explanatory reason, while the second one is based on the normative reason. According to Raz, the second explanation is more comprehensive or more exhaustive than the first one. Clearly, in some circumstances, explanation of the actions referring to (1) can also be adequate. Raz does not enumerate these circumstances, however, we may guess that it generally concerns situations when it is sufficient to explain the behaviour from the external point of view. And thus, explanation (1) is insufficient in the context of law; it only answers the question of the motives of acting in accordance with the law. No doubt such a question would be interesting for a psychologist or a sociologist of law. However, we may answer more questions which are interesting for a lawyer or a legal philosopher when we use explanation (2); particularly, we may determine whether the rule that was a motive of one's action was legal or not.

It is worth pointing out that Raz's proposition is antinaturalistic not only in methodological dimension. Considering his description normative facts, his concept is antinaturalistic also in the ontological dimension. If the normative facts exist independently from the views of the people they concern, they are ontologically basic.

The problems regarding such an ontological extravagance are well known. Among other, they concern the problem of recognizing the normative facts. In this context, it seems that we have to use questionable metaphors, like 'grasping' these facts by the mind. Difficulties also concern the problem of causal influence of the normative facts. After all, it is essential for Raz's conception to assume that at least sometimes people not only recognize these normative facts but are also motivated by them; if these facts were not motivating, it would be impossible to use them to evaluate or justify an action – it would violate the principle 'ought implies can'. However, the most fundamental problem concerning Raz's conception is related to his methodological antinaturalism. What is more, ontological antinaturalism of this philosopher is seems to be only a derivative of his methodological antinaturalism.

3. The mind from the normativity perspective

According to Raz, referring to normative facts allows us to... explain a significant feature of the mind which eludes its scientific explanation, i.e. that our thinking may be motivated by rules. In this context, Raz refers to the way that the beliefs are formulated:

Reason explanations explain action and belief by reference to their inherent features. After all,

^[10]Ibidem, p. 198.

it is inherent to beliefs that those having them take them to be warranted, and would abandon them had they thought that they were unwarranted. Similarly, by their nature intentions to act involve belief in reasons for the intended action. Hence, reason-explanations deepen our understanding of intentions, actions and beliefs, by contributing to an understanding of whether they have the features which they purport to have^[11].

Explanation based on the normative reasons is more comprehensive than explanation based only on beliefs, as it not only tells why a person has a certain belief, but also if the belief has its inherent feature, i.e. if it is justified.

According to Raz, explaining the action from the internal point of view refers to the normative reasons only because they can be used to evaluate the action. The understanding of the nature of beliefs is key in this matter. According to Raz, if a person is confident about something, by definition he or she considers his or her belief as justified. However, if the person will discover evidence undermining her belief, she will no longer have this belief. In other words, a thought is a belief only when it 'aims at truth'.

Raz is one of many philosophers who claim that beliefs and truth are closely related. Usually, they reckon that this relation may only be explained by ascribing beliefs some normative features^[12]. It means that if the beliefs are to

represent the reality accurately, their formation should be subject to certain rules. Certainly, normativity is an intuitive feature of beliefs, as we often describe them as correct or incorrect, rational or irrational, justified or unjustified. It suggests that the formation of beliefs is actually subject to the rules of correctness, rationality or adequate justification. It is worth to draw attention to three issues that pertain to the thesis of beliefs' normativity. Firstly, the analyses leading to embracing this thesis are usually not of a purely conceptual character; normativity is ascribed to beliefs understood as mental states of a person. Secondly, if belief formation is subject to rules, they play a causal part in the process of formation of these beliefs; this is related to the principle 'ought implies can'. If we evaluate beliefs, taking into consideration certain normative standards (e.g. classic logic or probability calculus), the reasonableness of such an evaluation is based on the assumption that the beliefs in question can be formed as a result of recognizing and following the rules of this standard.

There are numerous arguments supporting the thesis of the normativity of beliefs – a thesis adopted by Raz. Let us focus on two of them, namely the argument from holism of beliefs and the argument from transparency of beliefs. The argument from holism of beliefs refers to intuition, according to which beliefs of a person are connected with each other. For example, if a person believes that *p*, she usually will have beliefs that can be inferred from *p*. In order to illustrate this, let us imagine that we implanta false belief into someone, the content of which is 'I have a brother in Warsaw'^[13].

¹¹Ibidem.

¹²Wedgwood, R. (2002) *The Aim of Belief*, Philosophical Perspectives, vol. 16, p. 267–297; Boghossian, P. (2003) *The Normativity of Content*, Philosophical Issues, vol. 13, p. 31–45; Gibbard, A. (2003) *Thoughts and Norms*, Philosophical Issues, vol. 13, p. 83–98; Shah, N. (2003) *How Truth Governs Belief*, The Philosophical Review, vol. 112, p. 447–482; Engel, P. (2004) *Truth and the Aim of Belief*, in: *Laws and Models in Science*, ed.

Gillies, D., London, p. 77–97; Whiting D. (2010) *Should I Believe the Truth?*, *Dialectica*, vol. 64, p. 213–224.

¹³D. Dennett described a similar thought experiment in *Brain Writing and Mind Reading*, in: *Language, Mind and Knowledge*,

This belief is false because our victim does not have any siblings. Wondering what would happen with this belief, we will probably come to the conclusion that two options are available. Either it will be eliminated or supporting beliefs will be built around it which will explain not only why our victim has never seen her... brother, but also numerous other issues concerning this mysterious situation – what will alleviate the cognitive dissonance. The supporters of the thesis of the normativity of belief claim that beliefs' holism points to the fact that they are formed according to various rules of rationality, for example in accordance with the way the world is or the laws of logic.

The argument from transparency of beliefs also pertains to our intuitions concerning the formation of these mental states. The transparency of beliefs means that if we wonder whether we should believe that p , it essentially boils down to the consideration if p . As Jonathan Adler observes in this context:

From the first-person point of view, what I believe is just how things are, not how I conceptualize, interpret, or theorize my experience. Belief aspires to be transparent to the world. When I believe that p (e.g., the Yankees beat the Mets), then, briefly, things are for me this way: p (the Yankees did beat the Mets). In belief's everyday roles, prominently as guides to action, one sees through one's attitude to the world without seeing that attitude^[14].

If the beliefs are transparent, then the consideration if p boils down to looking for reasons

for p – and only reasons which adequately justifying that p will be taken into account. The transparency of beliefs means that if we wonder whether we should believe that p , it essentially comes down to considering if p . Evidential reasons are then an adequate justification of beliefs. An attempt to convince someone using non-evidential reasons – such as instrumental reasons which justify beliefs most advantageous to achieve certain goals – is doomed to fail. Evidentialism is understood here broadly as it embraces not only accordance with reality but also with the rules of rationality proposed by various normative standards.

Thus, from the first-person perspective – let us repeat that in Raz's opinion this perspective is key to understand the law and other social phenomena – it seems impossible to allow non-evidential reasons in considerations whether p . Moreover, it seems psychologically impossible from this perspective to believe that p if we do not have sufficient evidential reasons for p . On the other hand, embracing the third-person perspective seems to allow non-evidential reasons in the justification of beliefs. In order to illustrate the difference between the first-person and third-person perspectives, let us imagine the following situation: S is going to a job interview for a position that nine other persons apply for. All the candidates have similar skills and job experience, so each of them has 10% chance of getting the job. However, the persons who are self-confident during the job interview, increase their chances of success. Assuming that S is well aware of this situation, we may ask a question whether he should be confident that he will get the job. From the psychological point of view, it seems that S will be able to consider this only in the context of evidential reasons which are too weak to jus-

ed. Gunderson, K. (1975), *Minnesota Studies in the Philosophy in Science*, 7, Minneapolis: University of Minnesota Press, p. 403–416.

¹⁴Adler, J. (2002) *Belief's Own Ethics*, Cambridge, MA, p. 11.

tify his confidence that he will get the job. Due to a considerable number of other candidates, his chances of getting the job are quite low. However, from the third-person perspective it seems that he should be confident of getting the job as his purpose is to work there, and being confident about it increases his chances of achieving his goal.

4. Normativity and the cognitive sciences

The normativity of beliefs understood in this way raises numerous doubts and two... of them seem particularly important. The first doubt pertains to the fact that according to this thesis the mind has a feature which seems to evade the scientific method. For the scientific method allows to establish the facts regarding a given phenomenon, and establishing the valid rules pertaining to this phenomenon – e.g. the rules of thought – outreaches the domain of facts. This consequence of the thesis that belief is normative raises doubts, as it is based on conceptual intuitions pertaining to how the mind works. It seems, however, that such intuition give only a limited insight into how the mind actually works. The second doubt indicates that people often make mistakes in the process of belief formation – as numerous empirical studies show. For example, according to one of the important psychological research programmes, called ‘heuristics and biases’, people systematically make mistakes in reasoning and decision-making. Therefore, the assumption that all beliefs are subject to the rules of correctness or rationality seems too strong.

Commenting on these doubts, we should indicate that in the cognitive sciences the assumption that rules of rationality play a causal

role in human thought is not rare¹⁵. For example, the aforementioned ‘heuristics and biases’ research programme is based on such an assumption. Assessing the correctness of reasoning, judgement or decision from the perspective of a certain normative standard – such as logic or probability calculus – would be unreasonable if people could not follow the rules proposed by this pattern. In other words, discarding the assumption that thinking is subject to rules makes it difficult to claim that a given reasoning is true or false.

It is reasonable to differentiate between two understandings of the normativity of belief – strong and weak. The strong version of this thesis, assumed by Raz, consists in the claim that the normative facts explain the way human mind works. These normative facts may take various forms – e.g. they may be the rules of reasoning, legal rules or moral rules. Such rules are considered to be similar to laws which describe how the mind works. The weak version of the thesis that beliefs are normative only states that these rules are merely the idealisation of how the mind actually works. In other words, the idea that people are motivated by the normative facts is based on a commonsensical model of the mind which is sometimes very useful, and at times even essential. For example, this model is helpful in order to explain the law or even commonsensically understand one’s behaviour from the internal point of view; however, we should not mistake the model with the object to which it pertains. It seems that this is the way psy-

¹⁵Chater, N., Oaksford, M. (2003) The Rational Analysis of Human Cognition, in: Reason and Nature. Essays in the Theory of Rationality, Bermudez, J. L., Millar, A. (eds.), Oxford, p. 135–174; Stanovich, K., West, R. (2000) Individual Differences in Reasoning: Implications for the Rationality Debate?, Behavioral and Brain Sciences, vol. 23, p. 645–726..

chologists understand the mind when studying human rationality. They imply that human mind is subject to the rationality rules; and thus, they can assess its operations according to various normative standards. However, they are simultaneously aware that it is only an idealisation. Moreover, numerous studies within the aforementioned ‘heuristics and biases’ research paradigm suggest that this idealisation is quite strong. Let us mention a widely discussed example of such astudy, connected with the phenomenon of belief bias.

Belief bias is a tendency to prioritise the plausibility of the conclusion of reasoning over the validity of its logical structure when assessing its correctness. This is one of the best evidenced phenomena within the psychology... of reasoning. This effect may be noticed when people solve syllogisms. The tasks of solving syllogistic reasoning consist assessing whether the conclusion follows from the premises. Moreover, the participants are informed that only the given premises are relevant to evaluate the correctness reasoning^[16]. In a classic study of this type, the participants are presented with the following syllogisms:

Syllogism I:

- (P1) No addictive things are inexpensive.
- (P2) Some cigarettes are inexpensive.
- (C) Some addictive things are not cigarettes.

Syllogism II:

- (P1) No cigarettes are inexpensive.
- (P2) Some addictive things are inexpensive.
- (C) Some cigarettes are not addictive things.

The structure of these syllogisms is as follows:

Syllogism I:

- (P1) PeM
- (P2) SiM
- (C) PoS

Syllogism II:

- (P1) SeM
- (P2) PiM
- (C) SoP

Syllogism I is logically invalid. In the conclusion, the major term (‘P’ – drugs) is located before the minor term (‘S’ – cigarettes) and creates a PoS... type sentence; however, it should be located after the minor term and constitute a SoP type sentence – that would create a correct Festino syllogism according to the second figure. However, 71% of the research participants stated that this reasoning is valid. Syllogism II has the same logical structure, thus it is also invalid. However, only 10% of the research participants considered it valid^[17]. The only difference between the syllogisms presented is in changing the name substituted into the major term to the name substituted into the minor term, as in the first syllogism the major term is ‘addictive things’ while the minor term is ‘cigarettes’, while in the second one the major term is ‘cigarettes’ and the minor one is ‘addictive things’. Despite the fact that the logical structure of both syllogisms is the same, there is a significant difference in judging the validity of the reasonings.

We should have a look at the contents of the two conclusions to explain this difference. While the conclusion in syllogism I (‘Some addictive things are not cigarettes’) is believable,

¹⁶Evans, J., Over, D. (1996) *Rationality and Reasoning*, Psychology Press, Hove, p. 3.

¹⁷Evans, J., Barston, J., Pollard, P. (1983) *On the Conflict Between Logic and Belief in Syllogistic Reasoning, Memory and Cognition*, vol. 11, p. 295–306.

the conclusion in syllogism II is not ('Some cigarettes are not addictive things'). There is an obvious interpretation of the participants' answers – the conclusion consistent with their beliefs is judged as logically following from the premises, and the conclusion is inconsistent... with their beliefs as not logically following from the premises. Moreover, the premises in both syllogisms seem to be convincing for the participants. Such an explanation pertains to the aforementioned belief bias. It is also worth mentioning that more believable conclusions are more often accepted regardless of the logical validity of the reasoning; however, the belief bias is even more distinct in the case of invalid reasonings^[18].

A considerable number of experiments pertaining to the limitations of human rationality is only one of the reasons why weak understanding of the normativity of belief should be considered better justified than the strong one – as a feature that should be ascribed to the model of the mind's, not the mind itself. The supporters of strong understanding of this feature of belief draw too far-reaching conclusions based on fragile foundations, both conceptual and intuitive. Analysing the relation between reasons and beliefs, we should carefully differentiate the analyses of these reasons – as for example discussions concerning various normative systems – such as... logical or ethical systems – from the analyses concerning the question of what one should be confident of or how to act. The research on the various normative systems seems to be far more objective than the research on the correctness of beliefs, as the latter will be always relativized to the certain

situation. We may sometimes have the impression that the supporters of the strong version of the normativity of belief confuse these two levels of analyses.

In conclusion, if we assume that the research from the internal point of view implies commonsensical and in many ways imperfect model of the mind and it is not directly connected with the object that the model refers to, it is then difficult to agree with Raz who claims that explaining the action has to be necessarily based on the irreducible category of normative facts. On the other hand, he reasonably claims that – embracing first-person perspective – the normativity of beliefs is a feature of the mind. This may lead to the conclusion that the normative facts do exist, and at least sometimes the mind is able to grasp them – and as a result, they influence thought and action.

5. Folk model of the mind and the scientific explanation

The folk model of the human mind is an essential point of reference in the research on law. This model is assumed when we study law from an internal point of view. The model, according to which people have beliefs, intentions and other mental states that impact upon their thoughts and actions, is, however, an idealisation. We should not expect that the mental states it posits – acceptance of the legal rule is a good example here – can be fully operationalised in the context of empirical sciences of the mind. However, the difficulties concerning naturalisation of these mental states do not seem to be related to the existence of normative facts which are somehow grasped by the mind, and which cannot be a part of the scientific image of the world. These difficulties

¹⁸Evans, J. (2008) Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition, *Annual Review of Psychology*, 59, p. 264.

result rather from the inadequacy of the folk understanding of the mind. In other words, the description of the behaviour from the external point of view does not let us to take into account many features of this behaviour that would be interesting in the legal context.

According to Raz, acceptance of the legal rule is a useful conceptual tool in searching for answers to a lot of traditional, philosophical questions concerning law. This view is based on the following, plausible assumption: the determination whether a given rule is legal or not depends on the beliefs concerning this rule shared by at least some of the participants in the legal practice. Thus, it is irrelevant whether the majority of the community members accept the rule as a legal in order to judge if a whole community does so. Raz shares a view characteristic for many contemporary positivists – that the key issue here is the acceptance of the people using legal rules, primarily the judges^[19].

At this point, it would be worth to distinguish between believing that a given rule is legal and accepting this rule as legal. This differentiation will illustrate the incompleteness of explanation of behaviour in the legal context from the external point of view. Jonathan Cohen carried out one of the most exhaustive analyses concerning the differences between those two concepts and his proposition will be the basis of the following discussion^[20].

According to Cohen, the ‘belief that p ’ is a disposition to believe that p is true and *not- p* is

false. Thus, we may call this disposition an ‘affective disposition’. Equating the beliefs with the disposition to have some kind of feelings explains some of the features often ascribed to beliefs. What is particularly important, the affective disposition is not controlled by the person having it, similarly to the process of creating beliefs, as it may seem. In order to justify the claim about the automatism of belief formation, the argument mentioned above is key; i.e. that it is impossible to believe in something we consider false. The beliefs are formed on the basis of premises which pertain to the way the reality is presented to the person and she cannot influence it.

On the other hand, beliefs somehow seem to arise from conscious, controlled reasoning. According to Cohen, such mental phenomena should be called acceptances, not beliefs. He claims that:

To accept that p is to have or adopt a policy of deeming, positing, or proposing that p —i.e. of including that proposition or rule among one’s premisses for deciding what to do or think in a particular context, whether or not one feels it to be true that p ^[21].

Acceptance is different from assumption, supposition and conjecture, as these attitudes are temporary and usually embraced only in relation to a specific issue. For example, assumption is correct when we try to check if certain solutions of the problem are justified. Hence, we may assume that voluntarism concerning beliefs – according to which the process of creating beliefs is subject to control – is justified. This way, we may check if embracing this view leads to contradiction. Whereas,

¹⁹Raz, J. (1975) *Practical Reason and Norms*, Hutchinson, London, p. 171.

²⁰Cohen, J. (1995) *An Essay on Belief and Acceptance*, Oxford: Oxford University Press.

²¹*Ibidem*, p. 4.

acceptance is a permanent commitment to take actions and think according to a particular pattern; this commitment requires to firmly embrace a judgement as a premise in judging or making decisions.

Comparing the discussed mental states enables a more precise characteristics of belief and acceptance. It will allow to indicate the similarities and differences between them more clearly. In relation to the similarities, both beliefs and acceptances can be justified, however, having such a justification is not a condition necessary to possess them^[22]. What is also important, usually both types of mental states – with the same content – occur simultaneously. Sometimes it will be difficult to introspectively determine if a given state is a belief or acceptance. The belief that *p* is usually a premise for the acceptance that *p* – in this situation we may say that the belief changed into acceptance; and acceptance that *p* may become a premise for a belief that *p*.

However, according to Cohen, there is a significant difference between premises justifying beliefs and acceptances. As a result of the connection between beliefs and truth, the premises supporting beliefs are evidential, which means they are sufficient reasons to acknowledge the truthfulness of those beliefs. On the other hand, acceptances depend on the context and are embraced basing not only on evidential premises but also on commonsensical..., instrumental or ethical ones. For example, an advocate may accept the fact that his client is innocent in order to take his case. This premise will play a significant part in this lawyer's decision making process on this case, despite the fact that he may believe

that his client is guilty.

With some slight modifications, the described concepts of belief and acceptance are useful conceptual tools to indicate the features characteristic for explaining behaviour based on the folk model of the mind. The modification mentioned regards Raz's understanding of acceptance; he claims that accepting the legal rule occurs regardless of the context. Accepting the legal rule leads to – among others – rejecting all the extra-legal reasons which would be inconsistent with the accepted legal rule^[23].

The impact of the belief that a given rule is legal on behaviour can be explained from the external point of view. However, an analogous explanation concerning the legal rule acceptance is impossible. In the case of beliefs, this explanation will be causal, so it will explain how something happened. In the case of acceptance, this explanation will essentially come down to justifying a behaviour and identifying reasons that led to this behaviour – so it will explain why something happened. A practical syllogism is a typical example of explanation based on acceptance. In this syllogism, the first premise regards the accepted facts, the second one – the accepted purposes, and the conclusion is the action taken. When people explain their behaviour using practical syllogism, they do not indicate the causes of their behaviour but the reasons why they should behave this way. The relation between particular elements of this syllogism is logical or rational – not causal^[24].

The difference between explanation based on

²³Raz, J. *Practical Reason and Norms*, p. 139.

²⁴*ibidem*, p. 64.

²²*ibidem*, p. 16.

the belief that a rule is legal and explanation based on the legal rule acceptance does not have to lead to assuming that there are normative facts that the acceptances pertain to; and, as a consequence, embracing methodological antinaturalism. For example, according to Cohen, the reference point of the empirical research on human rationality – which includes, among others, the ability to reason or to make decisions – should be the rationality rules commonly accepted by their users^[25]. Thus, reconstructing human rational competence not only boils down to the actual way of reasoning or making decisions, but also is a normative pattern for these abilities. Here, Cohen adopts the principle formulated by Nelson Goodman, according to which the rules of rationality should be considered correct if they correspond to a reasonable and commonly accepted practice of application of these rules^[26]. In other words, if the rules of rationality, (in the context of this discussion also legal rules) are in a state of reflective balance – and they are when they were consciously and sensibly reflected on by their users, and then recognized as valid – these rules are then justified.

²⁵Cohen, J. (1981) Can Human Irrationality Be Experimentally Demonstrated?, *Behavioral and Brain Sciences*, vol. 4, p. 40.

²⁶Goodman, N. (1983) *Fact, Fiction, and Forecast*, Cambridge, MA, Harvard University Press, p. 67.

6. Conclusion

The basic aim of this article was a critical analysis of methodological antinaturalism of Joseph Raz concerning the research on law and other social phenomena. His stance is rooted in particular understanding of reasons for action. He understands reasons (which include, among others, legal rules) as facts, independent of the beliefs of the people they pertain to. As argued, the main problem for Raz and other normativists is to explain how such facts could affect thought and, consequently, action. It seems that the supporters of methodological antinaturalism implausibly identify the usually normative authority of various rules with the strength of the causal influence on thought and action. However, if we deny that there is such a relation between the normative sphere and the psychological one (stating that, from the internal point of view, the research on law is based on adopting a folk model of the mind, then the reasons for which methodological antinaturalism seems – at least *prima facie* – attractive, disappear. However, it does not mean that the explanation based on this folk model of the mind can be reduced to an explanation from the external point of view, as there are far-reaching differences between them in describing the phenomena explained.

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Table of contents 2017:

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